IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 45 OF 2006

Shri Mohamad Naushad,
Major in age,
Married, businessman,
Residing at MC 23,
Housing Board Colony,
Baina, Vasco-da-Gama, Goa. ..... Petitioner
(Original Complainant)

V e r s u s

Shri Anthony Carvalho,
Major in age,
Married, businessman,
Proprietor – MON JOHN,
Flat No.1,
Ground Floor, Dempo Odyssy,
Near St. Andrew Church,
Vasco-daGama, Goa. ..... Respondent
(Original Accused)

Mr. A. F. Diniz, Advocate for the Petitioner/Original Complainant.

Mr. S. K. Kakodker, Senior Advocate with Mr. M. Salkar, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 24th November, 2006.

JUDGMENT

This revision is directed against Order dated 12.07.2006, of the learned Sessions Judge, Margao.

2. Some facts are required to be stated to dispose of the present revision.

3. The petitioner is the Complainant who prosecuted the accused for bouncing of a cheque bearing no. 877680 dated 30.07.2005, for Rs.14,66,000/-. The learned Magistrate was pleased to issue process against the accused under Section 138 of the Negotiable Instruments Act, 1881, by Order dated 14.10.2005.

4. The accused preferred a revision application against the said Order dated 14.10.2005 and the learned Sessions Judge, by his Order dated 12.07.2006, was pleased to allow the said revision and set aside the Order of the learned Magistrate issuing process against the accused. In allowing the revision, the learned Sessions Judge came to the conclusion that a bare reading of the complaint and also the documents relied upon by the Complainant clearly indicate that the transaction of sale of the vessel was of a benami transaction, since according to the Complainant, the amount of the cheque was a debt payable by the accused, being the amount due to the Complainant towards the sale transaction. As per the learned Sessions Judge, the entire transaction of sale in respect of the said vessel was a benami transaction and even assuming that the said vessel was purchased by the Complainant, the fact remains that it is a benami transaction, and as such, the transaction is clearly prohibited by virtue of Section 4 of the Benami Transactions (Prohibition) Act, 1988, and that being the position, the amount of the cheque could not be recovered as a legally enforceable debt.

5. Admittedly, there were two cheques which were issued by the accused to the Complainant on account of the sale of the said Launch/vessel. The first was dated 27.07.2005 for a sum of Rs.3,50,000/-, which has been honoured by the accused and it is the second cheque dated 30.07.2005 for Rs.14,66,000/- which came to be dishonoured and the Complainant having addressed the statutory notice to the accused and the accused having failed to comply the same, the Complainant filed the complaint.

6. As stated by the Complainant, the Complainant was the owner of a motor Launch known as Mon-Jhon, registered under no.MRH 544 in the Office of the Captain of Ports, Panaji. As per the Complainant, the said vessel was purchased by him in February, 2002, from one Mr. Bharat K. Pednekar, but as the Complainant was not a member of the Mormugao Launch Owners Association, it was registered under mutual agreement in the name of Mr Edward Carvalho, the father of the accused.

7. As stated by the Complainant, it is the Complainant who was alone collecting all the hire charges due to him and meeting all the liabilities of the said vessel. According to the Complainant, in June 2005, in order to meet certain exigencies, he requested Mr. Edward Carvalho, to transfer the registration in the name of the accused and the accused swore an affidavit which was produced before the concerned officials for such transfer and, accordingly, the endorsement was made

on the certificate of registration, transferring the registration in the name of the accused. The Complainant and the accused have been friends since childhood.

8. The Complainant also stated that in June, 2005, under his consent, the accused offered the said vessel for sale for a price of Rs.21,50,000/- and it was agreed by both that anything above Rs.21,50,000/- would be the brokerage/commission of the accused. The offer for sale was jointly accepted by Santosh Naik and Mr. Hipolito Barreto and on 27.06.2005, the said prospective purchasers paid Rs.2,00,000/- in cash, as part payment of the agreed sale consideration to the accused, who received the same on behalf of the Complainant and issued a receipt to them.

9. The Complainant also stated that on 25.07.2005, the prospective purchasers paid a sum of Rs.11,50,000/- by demand draft to the accused and towards the balance amount, they issued five bearer cheques, which were encashed by the accused and thus the accused received the entire sale consideration of the said vessel in his name, as vessel was registered in his name. The Complainant stated that the entire consideration of Rs.21,50,000/- was received by the accused on behalf of the Complainant.

10. The Complainant also stated that the Complainant had instructed the accused to clear the loan which was availed for repairing and maintaining the said vessel. Accordingly, the accused issued a cheque bearing no. 877685 drawn on Bank

of India for Rs.3,33,594/- towards clearing the loan liability fully.

11. Therefore, as per the Complainant, the accused gave the said two cheques for Rs.3,50,000/- and Rs.14,66,000/-, the first of which was honoured but the second came to be dishonoured as already stated.

12. I have heard Shri Diniz, the learned Counsel on behalf of the petitioner-Complainant and Shri Kakodkar, the learned Senior Counsel on behalf of the respondent-accused.

13. On behalf of the Complainant it is submitted that the Complainant was entitled to the benefit of presumption available to the Complainant under Section 139 of the Act and in case the accused had to prove anything to the contrary, that could be done only in the course of the trial and, therefore, the complaint could not have been thrown out at the threshold. It is also contended that the averments in the complaint did not show that the transaction was a Benami Transaction in as much as the prohibition under Section 4 of the Benami Transactions (Prohibition Act) 1988, would not come in the way of the Complainant as the Complainant was not seeking the recovery of the Launch. On the other hand, it is submitted on behalf of the accused that the subject cheque was issued for payment of a debt which was not legally enforceable within the meaning of the explanation to Section 138 of the Act as a suit for recovery of such debt was prohibited by virtue of Section 4 of the said Benami Transactions (Prohibition Act) 1988. It is also submitted that the averments

in the complaint when read as a whole show that the transaction between the Complainant and the accused was a benami transaction and the complaint when read as a whole was sufficient to rebut the presumption which was otherwise available to the Complainant.

14. Admittedly, the Complainant has been non-suited by dismissal of his complaint at the threshold by the learned Sessions Judge by virtue of the impugned order. There is no dispute that the accused had issued the subject cheque to the Complainant towards the price of the Launch which belonged to the Complainant, and which was sold, according to the Complainant by the accused, with his consent. The ingredients which are required to be satisfied for making out a case under Section 138 of the Act have been explained by the Apex Court in various decisions and they are as follows:

(i) A person must have drawn a cheque on an account maintained by him in a bank for p[payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability,

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the accused in insufficient

to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv)the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v)the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. (See AIR 2000 S.C. 954).

Prima facie, therefore, the allegations of the Complainant show that all the ingredients of the offence under Section 138 were made out by the Complainant against the accused. In the case of ***M. M. T. C. Ltd. & anr. v. M/s. MEDCHL Chemicals and Pharma (P) Ltd. & anr. (AIR 2002 S.C. 182 / (2002) 1 S.C.C. 234,*** the Apex Court has reiterated that by virtue of Section 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved and that a Court is not justified in entertaining and accepting a plea that there was no debt or liability at the initial stage of proceedings and quash the complaint and that the fact that the cheque was not issued in discharge of a debt or liability could be proved by the accused only in the course of the trial and the burden is on the accused

and as stated by the Apex Court in ***M. S. Narayana Menon alias Mani v. State of Kerala & anr. ((2006) 6 S.C.C. 39)***, that burden could be discharged by the accused by the standard of preponderance of probabilities which can be drawn not only from the materials on record but also by reference to the circumstances upon which the accused relies and the burden is not as heavy that of the prosecution but it could be compared with that of preponderance of probabilities as in a civil case.

15. The mere fact that the Launch was registered in the name of the accused with the Captain of Ports, was no evidence to jump to the conclusion that the said Launch was held in ownership and possession by the accused as a benamidar. Whether a particular transaction is benami or not, is largely one of fact and the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction. If the burden of disproving the case of the Complainant, when a cheque is issued, is placed upon the accused, likewise the burden of showing that a transfer is a benami transaction, lies on a person who asserts that it is such a transaction. Therefore, in my view, the learned Sessions Judge could not have jumped to the conclusion that the accused was a benamidar in relation to the said Launch and as such, the amount of the cheque was not a legally recoverable debt. That could have been done, if at all, after the parties had led evidence and particularly the accused since the burden was on the accused to show that the transfer is benami and, therefore, the Complainant was not entitled to recover the money towards the sale of the same on account of the bar created by Section 4 of the Benami Transactions (Prohibition) Act 1988.

16. The averments of the complaint, the truth of which has got to be prima facie accepted at this stage, show that the said Launch was purchased by the Complainant from Bharat K. Pednekar and as he was not a member of the Mormugao Launch Association, it was initially registered in the name of the father of the accused and, thereafter, the registration was transferred in the name of the accused and otherwise show that it was owned and possessed by the Complainant.

17. Suffice it to observe that, the averments in the complaint do not disclose that the accused was a Benamindar of the said Launch which the accused is bound to prove in the course of the trial in case he is one.

18. In this view of the matter, this revision succeeds and as a result the Order dated 12.07.2006 requires to be disturbed and that of the learned Magistrate dated 14.10.2005 requires to be upheld. Parties to appear before the learned trial Court on 18.12.2006, at 10.00 a.m, for further proceedings.

N. A. BRITTO, J.

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